STATEMENT OF WILLIAM L. MESSENGER, STAFF ATTORNEY, NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC., TO THE UNITED STATES SENATE COMMITTEE ON APPROPRIATIONS SUBCOMMITTEE ON LABOR, HEALTH, AND HUMAN SERVICES, EDUCATION AND RELATED AGENCIES HEARING: September 23, 2004

Chairman Specter and Distinguished Senators:

Thank you for the opportunity to comment on the National Labor Relation Board's ("NLRB" or "Board") current "recognition bar" policy in these important hearings.

My name is William L. Messenger. I am a Staff Attorney with the National Right to Work Legal Defense Foundation, in Springfield, Virginia. Since the Foundation was founded in 1968, it has provided free legal aid to workers who choose to stand apart from a labor union, to exercise the "right to refrain" that Congress granted them under § 7 of the National Labor Relations Act, 29 U.S.C. § 157, and that, more fundamentally, is guaranteed by the First Amendment's freedom of association.

I am counsel or co-counsel in several cases pending before the NLRB challenging the Board's "recognition bar" policy, which is the subject matter of this hearing. *See* Metaldyne Precision Forming/UAW (St. Marys, PA), 341 N.L.R.B. No. 150 (2004); UAW & Dana Corp. (Upper Sandusky, OH), 341 N.L.R.B. No. 150 (2004); USWA & Cequent Towing Products (Goshen, IN), N.L.R.B. Case No. 25-RD-1447. I also represent individual employees in several cases challenging various forms of so-called "neutrality agreements."[1]

INTRODUCTION

In 1966, with virtually no reasoning or analysis, the Board planted the seeds of what has become known as the "recognition bar" in Keller Plastics Eastern, Inc., 157 N.L.R.B. 583, 587 (1966). From this rudimentary ruling mushroomed an unfair and undemocratic recognition bar that blocks employees from exercising their statutory right to a decertification election (or otherwise changing representatives) once an employer unilaterally bestows voluntary recognition on a particular union.

Employees enjoy a **statutory** right to petition for a decertification election under § 9(c)(1)(A)(ii) of the National Labor Relations Act ("NLRA" or "Act"). By contrast, the voluntary recognition bar–which frustrates employees' right to a decertification election–is not a creature of statute. It is a discretionary Board policy which should be reevaluated when industrial conditions warrant.

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[1] *See* Patterson v. Heartland Industrial Partners, et. al, No. 5:03 CV 1596 (U.S. District Court, N.D. Ohio); UAW & Dana Corp. (Bristol, VA), Case Nos. 11-CB-3397, 11-CB-3398, 11-CB-3399; UAW & Thomas Built Buses, Inc, (High Point, NC), Case Nos. 11-CB-3455-1, 11-CA-20338; USWA & Heartland Industrial Partners (Cleveland, Ohio), Case No. 8-CE-84; UAW (Detroit, MI), Case Nos. 7-CE-1786 & 7-CE-57; USWA & Goodyear Tire & Rubber Co. , (Asheboro, NC), Case Nos. 11-CA-20434 *et. seq.*; USWA & Metaldyne Corp. (Cleveland, OH), Case No. 8-RD-1966.

The time has come for the Board to reassess entirely the underlying purpose of, and need for, a recognition bar. This is particularly true given the growth of so-called "voluntary recognition agreements." In these agreements, unions and employers deliberately take advantage of the Board's recognition bar rule to completely exclude the NLRB from the process in which employees choose (or reject) union representation. In a perverse way, the Board's electoral machinery is being driven to obsolescence by its own recognition bar policy.

Exclusion of the NLRB from the representational process leaves employee rights in the abusive hands of employers and unions that are pursuing their own self-interests under these agreements. Unions are desperately seeking additional members and dues revenues. Employers are (naturally) pursuing their business interests, such as avoiding coercive union corporate campaigns or obtaining pre-negotiated "sweetheart deals" regarding future-organized employees' terms and conditions of employment. Neither entity has any interest in protecting employee rights to freely choose or reject union representation (which is what the NLRB exists to protect).

Employee free choice should not, and under the text of the Act can not, be subject to the vagaries of self-interested unions and employers. Accordingly, abolition of the "voluntary recognition bar" is needed to reestablish the Board's proper role in the representational process, and thereby protect **employee** rights to freely choose or reject union representation.

Thankfully, the NLRB is currently evaluating the propriety of the recognition bar in a series of important cases.[2] We hope that a prompt decision in these cases will result in the rescission of the recognition bar policy, thereby restoring to employees their right to a secret-ballot challenging the status of an employer-recognized union.

OVERVIEW OF BASIC CONCEPTS

Under current Board law, a union can become the exclusive representative of a group of employees in three ways: (1) be "certified" as the representative of employees pursuant to an NLRB-conducted secret-ballot election; (2) be "recognized" by an employer as the representative of its employees; or (3) through an NLRB "bargaining order" in which the Board orders an employer to recognize and bargain with a union as the remedy for its unfair labor practices. The third method, which is reserved for extraordinary situations, does not concern us here.

"Certification" occurs when a union obtains the majority of votes in a NLRB-conducted, secret-ballot election. The NLRB "certifies" that union is the exclusive representative of employees based upon the uncoerced support of a majority of employees. NLRB officials control and monitor the conduct of such elections to ensure their validity and protect employee free choice. *See* General Shoe Corp., 77 N.L.R.B. 124, 127 (1948) ("In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees").

"Recognition" is where an employer recognizes a particular union to be the exclusive representative of a group of its employees, and the union accepts such recognition. The NLRB is not involved in this process. Employer recognition is simply a private agreement between a

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[2] *See* Metaldyne Precision Forming/UAW (St. Marys, PA), 341 N.L.R.B. No. 150 (2004); UAW & Dana Corp. (Upper Sandusky, OH), 341 N.L.R.B. No. 150 (2004); USWA & Cequent Towing Products (Goshen, IN), N.L.R.B. Case No. 25-RD-1447.

union and an employer in which both purport that a majority of employees desire the union's representation.

Employers frequently recognize unions pursuant to pre-arranged agreements between the entities. These agreements are often referred to as "neutrality agreements," "partnership agreements," or "voluntary recognition agreements." While the terms of the agreements vary greatly, a standard provision is an obligation by the employer to recognize the union without a NLRB secret-ballot election. Other common provisions include employer commitments to assist union organizing campaigns against their employees, and union commitments to behave in an employer-friendly manner upon being recognized.

The National Labor Relations Act ("NLRA") grants employees a *statutory* right to petition for a decertification election challenging the status of a recognized or certified union. Section 9(c)(1)(A)(ii) states that employees may file an election petition asserting that "the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative." 29 U.S.C. § 159(c)(1)(A)(ii).

The only statutory limitation on decertification elections is when, within the "preceding twelve month-period, a valid *election* shall have been held." 29 U.S.C. § 159(e)(2) (emphasis added). Thus, employees may not petition for an election for one year after a union is certified in an NLRB election. However, there is no statutory restriction on an employee's right to petition for an election after a union is merely recognized by their employer.

The "recognition bar" is an NLRB created policy that prevents employees from exercising their statutory right to petition for an election after employer recognition of a union. The bar precludes elections for "reasonable" period of time, which can include a year.[3] The validity of this policy is the subject of this testimony.

ISSUE PRESENTED

How Does the NLRB Determine if an Employer-Recognized Union Actually Has the Uncoerced Support of a Majority of Employees?

In a narrow sense, the issue is the validity of the Board's recognition bar policy. However, the overarching issue is: how should the NLRB determine if an employer-recognized union actually has the uncoerced support of a majority of employees? The proper, statutorily prescribed method for making this determination is an NLRB-conducted, secret-ballot election.

[3] *See* MGM Grand Hotel Inc., 329 N.L.R.B. 464, 471-472 (1999) (election petition filed 356 days after employer recognition dismissed pursuant to recognition bar). However, as a practical matter, the actual bar to elections is three or more years due to common provisions in "neutrality agreements" that guarantee a collective bargaining agreement within a few months after recognition. This is discussed at greater length below.

The NLRB was created by Congress to protect *employee* rights.[4] The most important of these rights is an employee's right to choose union representation, or refrain from union representation. 29 U.S.C. § 157. There could be "no clearer abridgement" of this right than for an employer to recognize a union that does not enjoy the actual, uncoerced support of a majority employees in the bargaining unit. Ladies Garment Workers (Bernhard-Altmann Texas Corp.) v. NLRB, 366 U.S. 731, 737 (1961). The NLRB has a duty to ensure that an employer-recognized union actually enjoys the uncoerced support of a majority of employees.

However, employer recognition of a union occurs entirely outside of NLRB processes and supervision. Indeed, the primary purpose of employer/union "partnership agreements" is to exclude the NLRB from the representational process.[5] Employer recognition is merely a *private* agreement between a union and an employer in which both entities purport that a majority of employees desire the representation of the union.

Employer recognition does not itself mean that the employer-recognized union actually enjoys uncoerced support of a majority employees. "The fact that an employer bargains with a union does not tell us whether the employees wish to be represented by the union." Baseball Club of Seattle, LP, Seattle Mariners, 335 N.L.R.B. 563, 567 n.2 (2001) (Member Hurtgen, dissenting); *see also* Ladies Garment Workers, 366 U.S. 731 (employer negotiated with minority union based on erroneous "good faith" belief that union had majority support of employees).

The NLRB itself does not know whether or not employees actually support the union their employer designated to represent them, unless and until the Board takes some action to determine the representational preferences of employees. This fact is readily apparent from the facts of the three primary cases in which the NLRB is reviewing the validity of the recognition bar doctrine:

> Metaldyne Precision Forming & UAW (St. Marys, PA), Case Nos. 6-RD-1518 and 6-RD-1519. Metaldyne and the UAW are parties to a secret "partnership agreement." In December, 2003, Metaldyne declared the UAW to be the representative of its employees pursuant to that agreement. Within days after employer recognition, **over 50%** of employees signed a showing of interest against UAW representation and for a decertification election. The election petition was dismissed under the recognition bar policy.

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[4] *See* 29 U.S.C. §§ 153-54; Lechmere, Inc. v. NLRB, 502 U.S. 527, 532 (1992) ("By its plain terms, thus, the NLRA confers rights only on *employees*, not on unions or their nonemployee organizers"); Levitz Furniture Co. of the Pacific, Inc., 333 N.L.R.B. 717, 728 (2001) (employers only statutory interest in representational matters "is in ensuring that they do not violate Section 8(a)(2) by recognizing minority unions").

[5] Jonathan P. Hiatt & Lee W. Jackson, Union Survival Strategies for the Twenty-First Century, Labor Law Journal, Summer/Fall 1996, p. 176 (AFL-CIO's General Counsel writes that unions should "use strategic campaigns to secure recognition ... outside the traditional representation processes").

UAW & Dana Corp. (Upper Sandusky, OH), Case No. 8-RD-1976. Dana and the UAW are parties to a secret "partnership agreement." Pursuant to this agreement, Dana provided the UAW with personal information about employees, access to its facilities, and conducted a series of captive audience meetings in which Dana praised its "partner" union. Dana then recognized the UAW as the representative of its employees. Approximately 33 days later, a decertification petition was filed, duly supported by 35% of employees. The election petition was dismissed under the recognition bar policy.

USWA & Cequent Towing Products (Goshen, IN), Case No. 25-RD-1447. Cequent and the USWA are parties to a secret "neutrality agreement." Pursuant to their agreement, Cequent and the union launched an organizing drive against Cequent's employees in Goshen, IN. During the campaign (and before employer recognition), a **majority** of employees signed a petition stating that they did not want the USWA to be their representative, and wanted an NLRB election in the event that Cequent ever recognized the USWA. Despite this petition against USWA representation, Cequent recognized the USWA as the representative of its employees. An election petition was filed by employees within **three days** of employer recognition. The petition was dismissed under the recognition bar policy.

In each of the above cases, it is *at best* unclear whether a majority of employees actually desires the representation of the employer-recognized union. Indeed, it is likely that the employees do not want that representation.

Most important, the NLRB does not know what the actual free choice of Metaldyne, Dana, and Cequent employees is with regard to union representation.[6] The Board has a statutory duty to ensure that a union acting as the exclusive representative of employees enjoys the uncoerced support of a majority. The issue then is how–or through what procedural mechanism–does the NLRB determine if an uncoerced majority of employees actually desires the representation of an employer recognized union?

ANALYSIS

There are three possible methods through which the NLRB could attempt to determine whether an uncoerced majority of employees support an employer-recognized union. First, the Board can simply defer to the decision of the employer and union. Second, the NLRB can rely on unfair labor practice proceedings challenging the employer's recognition as unlawful under the NLRA. Third, the NLRB can conduct secret-ballot election to determine employees' true representational preferences.

[6] That the recognition bar precludes the NLRB from conducting elections in these cases, despite the fact that the NLRB does not know employees' actual representational preferences at the time, is perhaps the doctrine's greatest flaw. The recognition bar is effectively a policy of deliberate blindness by the NLRB regarding the existence of employee support for an employer recognized union.

As discussed at greater length below, the first and second options are grossly insufficient to protect employee freedom of choice. Deference to the decision of the employer and union leaves employee rights in the abusive hands of these entities, each of which is pursuing its own self-interests. This is particularly true given the growth of "voluntary recognition agreements," in which recognition is bestowed pursuant to pre-arranged deal between an employer and union.

Unfair labor practice proceedings are also inadequate, as those procedures were not designed to determine the representational desires of employees. Instead, unfair labor practice charges are designed to punish (and thereby prevent) violations of the NLRA. Moreover, conduct which itself does not amount to an unfair labor practice, but is offensive to employee free choice in an NLRB election because of the higher standards of conduct required in election proceedings, is inherent in any union "card check" campaign.

Only the third option–representational proceedings culminating in an election–accurately determines whether an employer-recognized union truly has the uncoerced support of employees. Indeed, Congress created the representational procedures of the NLRA for expressly this purpose. *See* 29 U.S.C. §§ 159-61; *see also* NLRB v. Gissel Packing Co., 395 U.S. 575, 602 (1969) ("secret elections are generally the most satisfactory-indeed the preferred-method of ascertaining whether a union has majority support").

Unfortunately, the Board's recognition bar policy precludes elections after employer recognition, thereby preventing employees and the NLRB from determining the actual representational preferences of employees. This was the doctrine's affect in the Metaldyne, Dana, and Cequent cases discussed above, in which election petitions were dismissed in spite of manifest uncertainty as to what the free choice of employees may be with regard to union representation.

The Board should overrule and discard its current recognition bar policy. The bar serves only to prevent employees and the NLRB from determining whether an uncoerced majority of employees desire the representation of an employer-recognized union.

I. The NLRB Cannot Defer to the Self-Interested Choice of Employers And Unions With Regard to the Representational Preferences of Employees.

1. NLRB Cannot Assume That Employer Recognition of a Union Proves that An Uncoerced Majority of Employees Actually Supports Union Representation.

An employer voluntarily recognizing a union does not itself indicate that employees freely wish to be represented by that union. Voluntary recognition means only that an employer has selected a particular union to represent its employees without a Board-certified election. An employer could potentially voluntarily recognize a union that has majority employee support, does not have majority support, or whose employee support was obtained through coercion.[7]

[7] *See* Ladies Garment Workers, 366 U.S. 731 (employer negotiated with minority union based on erroneous good faith belief that union had majority support of employees); *see also* Duane Reade, Inc., 338 N.L.R.B. No. 140 (2003), *enforced*, Case No. 03-1156, 2004 WL 1238336 (D.C. Cir. June 10, 2004) (employer recognized union after unlawfully assisting the union by coercing employees to sign union authorization cards).

The Board cannot blindly defer to employer and union determinations regarding employees' representational preferences.[8] As the Supreme Court long ago recognized, deferring to even an employer's "good-faith" determination that a union has majority employee support "would place in *permissibly careless employer and union hands* the power to completely frustrate employee realization of the premise of the Act–that its prohibitions will go far to assure freedom of choice and majority rule in employee selection of representatives." Ladies Garment Workers, 366 U.S. at 738-39 (emphasis added).[9]

Indeed, there is a long and tawdry history of cases in which employers recognized unions that did not enjoy the support of an uncoerced majority of employees. [10] In many cases, the employer itself distorted employee free choice by pressuring employees to "vote" for a favored union by signing union authorization cards.

The Board's current policy of dismissing employee election petitions seeking to determine whether a union has the actual support of employees, because an employer avers that the union it recognized had majority employee support (i.e. the recognition bar), repeats the folly identified in Ladies Garment Workers. The Board's failure to determine for itself whether the employer-recognized union actually has the uncoerced support of a majority of employees by conducting a secret ballot election places fundamental employee rights directly in "permissibly

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[8] *See* Auciello Iron Works v. NLRB, 517 U.S. 781, 790 (1996) ("There is nothing unreasonable in giving a short leash to the employer as vindicator of its employees' organizational freedom"); *see also* Levitz Furniture, 333 N.L.R.B. 717 (employer determinations as to employee support or opposition to union representation disfavored); Underground Service Alert Southern California, 315 N.L.R.B. 958, 960-61 (1994) (same).

[9] This lesson was recently reiterated in Nova Plumbing, Inc. v. NLRB, 330 F.3d 531 (D.C. Cir. 2003). There, the Board deferred to a contractual agreement between an employer and union stating that the union had majority employee support, without independently verifying the truth of that assertion. The D.C. Circuit reversed, holding that "[b]y focusing exclusively on employer and union intent, the Board has neglected its fundamental duty to protect employee section 7 rights, opening the door to even more egregious violations than the good faith mistakes at issue in Garment Workers." Id. at 537.

[10] The cases where an employer conspired with its favored union to secure "recognition" of that union are legion. *See, e.g.*, Duane Reade, Inc., 338 N.L.R.B. No. 140 (2003), *enforced*, Case No. 03-1156, 2004 WL 1238336 (D.C. Cir. June 10, 2004) (employer unlawfully assisted UNITE and unlawfully granted recognition); Fountain View Care Center, 317 N.L.R.B. 1286 (1995), *enf'd*, 88 F.3d 1278 (D.C. Cir. 1996) (supervisors and other agents of the employer actively encouraged employees to support the union); NLRB v. Windsor Castle Healthcare Facility, 13 F.3d 619 (2nd Cir. 1994), *enforcing* 310 N.L.R.B. 579 (1993) (employer provided sham employment to union organizers and assisted their recruitment efforts); Kosher Plaza Super Market, 313 N.L.R.B. 74, 84 (1993); Brooklyn Hospital Center, 309 N.L.R.B. 1163 (1992), *aff'd sub nom.* Hotel, Hosp., Nursing Home & Allied Servs., Local 144 v. NLRB, 9 F.3d 218 (2nd Cir. 1993) (employer permitted local union, which it had already recognized as an exclusive bargaining representative, to meet on its premises for the purpose of soliciting union membership); Famous Casting Corp., 301 N.L.R.B. 404, 407 (1991) (employer actions unlawfully supported union and coerced the employees into signing authorization cards); Systems Management, Inc., 292 N.L.R.B. 1075, 1097-98 (1989), remanded on other grounds, 901 F.2d 297 (3rd Cir. 1990); Anaheim Town & Country Inn, 282 N.L.R.B. 224 (1986) (employer actively participated in the union organizational drive from start to finish); Meyer's Cafe & Konditorei, 282 N.L.R.B. 1 (1986) (employer invited union it favored to attend hiring meeting with employees); Denver Lamb Co., 269 N.L.R.B. 508 (1984); Banner Tire Co., 260 N.L.R.B. 682, 685 (1982); Price Crusher Food Warehouse, 249 N.L.R.B. 433, 438-49 (1980) (employer created conditions in which the employees were led to believe that management expected them to sign union cards); Vernitron Electrical Components, 221 N.L.R.B. 464 (1975), enf'd., 548 F.2d 24 (1st Cir. 1977); Pittsburgh Metal Lithographing Co., Inc., 158 N.L.R.B. 1126 (1966).

careless employer and union hands." Id.

Worse still, the Board abdicates its statutory duties by deferring to employer and union determinations as to the representational preferences of employees. Congress empowered the NLRB to administer the Act and decide representational matters. *See* 29 U.S.C. §§ 153-54, 159-161. The Board is thereby charged with protecting employee rights under § 7 of the Act, *see, e.g.,* 29 U.S.C. § 160, and with determining and ensuring that employees' representational wishes are realized under § 9 of the Act. *See* 29 U.S.C. § 159. The Board cannot delegate its duties to self-interested employers and unions.

2. Employer Recognition Bestowed Upon a Union Pursuant to a "Voluntary Recognition Agreement" Counsels Heightened Board Scrutiny Regarding Whether an Employer Recognized Union Truly Enjoys the Uncoerced Support of a Majority of Employees.

Employer recognition of a union pursuant to a pre-arranged deal between the entities counsels even greater scrutiny from the NLRB than employer recognition made in the absence of such an arrangement (which is itself undependable). Employer recognition pursuant to a "voluntary recognition agreement" is not an "arm's length" determination that likely reflects the free choice of employees. Instead, it reflects only the intersection of the employer and union self-interests that led to the parties to make the agreement in the first place.

Unions are aggressively seeking voluntary recognition agreements to satisfy their self-interest in acquiring more dues paying employees to replenish their rapidly diminishing ranks.[11] Every new facility organized brings more members into the union, more money into union coffers through compulsory dues payments, and places more power in the hands of union officials.[12]

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[11] The facts are well known: most unions are desperate for new dues paying members. In 2003, 12.9 percent of wage and salary workers were union members, down from 13.3 percent in 2002, according to the U.S. Department of Labor's Bureau of Labor Statistics. http://www.bls.gov/news.release/union2.nr0.htm (January 21, 2004). The number of persons belonging to a union fell by 369,000 in 2003, to a total of 15.8 million. The union membership rate has steadily declined from a high of 20.1 percent in 1983, the first year for which comparable union data are available. For example, in 1982, the Steelworkers claimed 1.2 million members, but by 2002 the number was 588,000. In 1982 the UAW claimed 1.14 million members, by 2002, 700,000 members. As of today, only 8.2% of the private sector workforce is unionized, and the other 91.8% do not appear to be flocking to join. IBM Corp., 341 N.L.R.B. No. 148, slip op. at 19 n.9 (2004). In UFCW Local 951 (Meijer, Inc.), 329 N.L.R.B. 730 (1999), Texas A & M labor economist Morgan O. Reynolds testified that the single largest factor hindering union organizing is *employee* resistance. According to Prof. Reynolds, polling data commissioned by the AFL-CIO indicates that 2/3 of employees are not favorably disposed towards unions. (Hearing Transcript pp. 1382-83).

[12] In United Food & Commercial Workers Locals 951, 7 & 1036 (Meijer, Inc.), 329 N.L.R.B. 730, 732, 734-35 (1999), the UFCW unions and the Board majority relied upon the expert testimony of a labor economist, Professor Paula Voos. Prof. Voos has written that unions seek to organize for a whole host of reasons, including the desire of union leaders for political aggrandizement and power; the monetary self-interest of union leaders to keep and enhance their own jobs and wages; and the perceived "social idealism" and "ideological gains" brought about by union organizing. *See* Paula Voos, Union Organizing Costs and Benefits, 36 Industrial and Labor Relations Review 576, 577 (July 1983). Professor Voos also wrote that organizing is a profit-making venture for many unions. Id. at 577 & n.5. For example, she recognized that unions often organize larger units precisely because that is "where the money is!" Id. at 578 n.8.

By seeking voluntary recognition agreements, unions are effectively organizing *employers*, not employees, by coercing or coaxing the employers to agree in advance which particular union is to represent employees. The employer and its anointed union then work together to organize employees from the "top down," irrespective of the employees' actual preference.[13]

Unions obtain voluntary recognition agreements from employers with a combination of the "stick" and the "carrot." The "stick" often includes "corporate campaigns" against the employer,[14] the use of secondary pressure,[15] and enlisting the aid of state or local government to force private employers to sign voluntary recognition agreements with a favored union as a condition of doing business with the governmental entity.[16]

The "carrot" frequently includes pre-negotiating terms and conditions of employment favorable to the employer that will come into effect upon the union successfully organizing employees.[17] In each of the three major recognition bar cases currently pending before the

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[13] Organized labor's "top-down" organizing strategy is repulsive to central purposes of the NLRA, and creates the potential for severe abuse of employees' § 7 rights. *See* Connell Construction Company, Inc. v. Plumbers & Steamfitters Local No. 100, 421 U.S. 616, 632 (1975) ("One of the major aims of the 1959 Act was to limit 'top-down' organizing campaigns"); Woelke & Romero Framing v. NLRB, 456 U.S. 645, 653 n.8 (1982) ("It is undoubtedly true that one of the central aims of the 1959 amendments to the Act was to restrict the ability of unions to engage in top-down organizing campaigns") (citations omitted).

[14] It is well documented that these corporate campaigns include, *inter alia*, baseless lawsuits, unfavorable publicity to cast the employer in an evil light and pressure by so-called "community activists." *See* Daniel Yager & Joseph LoBue, Corporate Campaigns and Card Checks: Creating the Company Unions of the Twenty-First Century, 24 Employee Relations Law Journal 21 (Spring 1999); Symposium: Corporate Campaigns, 17 Journal of Labor Research, No. 3 (Summer 1996); Herbert R. Northrup & Charles H. Steen, Union 'Corporate Campaigns' as Blackmail: the RICO Battle at Bayou Steel, 22 Harv. J. L. & Pub. Pol'y 771 (1999).

[15] *See, e.g.*, Pittsburgh Fulton Renaissance Hotel, Case No. 6-CE-46, at 5 (N.L.R.B. G.C. Feb. 7, 2002) (Division of Advice finds that provision of neutrality agreement that "does not permit the Employer to lease, contract or subcontract its operations . . . to any person unless that person agrees to neutrality, access, voluntary recognition, card-check, no-strike/no-lockout, etc. provisions of the neutrality agreement" violates § 8(e), but advises against issuing a complaint because it is time-barred under § 10(b)); Int'l Union UAW, Case No. 7-CE-1786 et al (case pending before General Counsel alleging that UAW has § 8(e) agreement with auto manufacturers to not do business with automobile parts suppliers that do not sign voluntary recognition agreements with UAW); Heartland Industrial Partners (USWA), Case No. 8-CE-84 (case pending before General Counsel alleging that USWA has § 8(e) agreement with an investment company that requires the company to not do certain business with employers that will not sign the USWA neutrality agreement).

[16] *See* Aeroground, Inc. v. City & County of San Francisco, 170 F. Supp. 2d 950 (N.D. Cal. 2001) (San Francisco Airport Authority mandate that private concessionaires who wished to lease space at the airport had to first sign a neutrality agreement preempted); Chamber of Commerce v. Lockyer, 364 F.3d 1154 (9th Cir. 2004) (California statute that forbids employers who receive state grants or funds from using such funds to advocate against or in favor of union organizing is preempted); H.E.R.E. Local 57 v. Sage Hospitality Resources LLC, 299 F. Supp. 2d 461 (W.D.Pa. 2003), *appeal pending*, Third Circuit Case No. 03-4168 (City of Pittsburgh pressured hotel operator to sign a neutrality and card check agreement as a condition of approving the public financing necessary to complete its project, even directing the hotel operator to contact specific HERE officials to negotiate this mandatory arrangement).

[17] *See* Majestic Weaving Co., 147 N.L.R.B. 859 (1964), *enforcement denied on other grounds*, 355

Board, the union agreed to "sweetheart" collective bargaining terms in exchange for employer assistance with organizing employees.

In USWA and Cequent Towing Products (Goshen, IN), N.L.R.B. Case No. 25-RD-1447, the USWA agreed to a "Side Letter and Framework" agreement that limits the wages and benefits employees can attain after the USWA is recognized as their union representative.[18] In UAW and Dana Corp. (Upper Sandusky, OH), Case No. 8-RD-1976, the UAW signed a "partnership agreement" with Dana in which the union pre-negotiated several terms and conditions of employee's employment in a manner favorable to the employer.[19] Finally, in Metaldyne Precision Forming and UAW (St. Marys, PA)., Case Nos. 6-RD-1518 and 6-RD-1519, Metaldyne and the USWA entered into a "partnership agreement" in which the USWA sacrificed the right of employees to strike or engage in work actions to support bargaining demands.[20]

A typical example of the "carrot" of favorable terms and conditions of employment unions are willing to offer employers in exchange for assistance with organizing is the "Agreement on Preconditions to a Card Check Procedure Between Freightliner LLC and the UAW." This reprehensible agreement speaks for itself. A copy of it is attached to this testimony.

Employers have a wide variety of self-interested business reasons to enter into voluntary recognition agreements that have nothing to do with facilitating employee free choice. This primarily includes avoiding the "stick" of union pressure tactics, and/or obtaining the "carrot" of favorable future collective bargaining agreements, as discussed above. Other reasons for which employers have assisted union organizing drives include: (a) to cut off the organizing drive of a less favored union; (b) because of the existence of a favorable bargaining relationship with the union at another facility; or (c) as a bargaining chip during negotiations regarding other bargaining units.[21]

F.2d 854 (2nd Cir. 1966)

[18] *See* November 27, 2000, Side Letter and Framework for a Constructive Collective Bargaining Relationship Agreements between Heartland Industrial Partners, LLP (Cequent's parent company) and the USWA, at Side Letter § 9(A-C).

[19] On September 3, 2004, the NLRB's Office of General Counsel decided to issue unfair labor practice complaints against the UAW and Dana for violating §§ 8(a)(1), 8(a)(2), and 8(b)(1)(A) of the Act by entering into agreements regarding employees' terms and conditions of employment in their "partnership agreement" . *See* Dana Corp. (UAW), Case Nos. 7-CA-46965 *et. seq*., Dana Corp. (UAW), Case Nos. 7-CA-47079 *et. seq*., and Dana Corp. (UAW), Case Nos. 11-CA-20134 *et. seq*.

[20] Waiving employees' right to strike is a massive concession at the expense of employees, as it destroys employee bargaining leverage to obtain favorable terms and conditions of employment. "The economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms." NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 181 (1967) *see also* Pattern Makers League v. NLRB, 473 U. S. 95, 129 (1985) ("The strike or the threat to strike is the workers' *most effective* means of pressuring employers, and so lies at the center of the collective activity protected by the Act") (emphasis added).

[21] *See* Price Crusher Food Warehouse, 249 N.L.R.B. 433 (1980); Brooklyn Hospital Center, 309 N.L.R.B. 1163 (1992), *aff'd sub nom*., Hotel, Hosp., Nursing Home & Allied Servs., Local 144 v. NLRB, 9 F.3d 218 (2nd Cir. 1993); and Kroger Co., 219 N.L.R.B. 388 (1975), respectively.

None of the union or employer motivations or arrangements for entering into voluntary recognition agreement center on ensuring employee free choice. Instead, unions and employers seek and enter into these agreements purely to satisfy their narrow self-interests. Accordingly, employer and union determinations regarding the representational choices of employees that are made pursuant to pre-arranged "partnership agreements" are entitled to no deference from the NLRB.

II. Unfair Labor Practice Proceedings are An Inadequate Substitute for Secret-Ballot Elections for Determining the Representational Preferences of Employees.

1. Unfair Labor Practice Proceedings Are Not Designed to Determine the Representational Preferences of Employees.

Unfair labor practice procedures are inadequate to determine whether employees support or oppose union representation because that is simply not what the procedures were designed by Congress to accomplish. Sections 10 and 11 of the Act empower the Board to prevent and remedy violations of the Act. 29 U.S.C. § 160-61. Sections 3(d) and 10 of the Act assign the General Counsel with the responsibility of investigating unfair labor practice charges, issuing and prosecuting complaints, and seeking compliance with Board orders in Court. These sections were not designed to determine the representational wishes of employees. 29 U.S.C. § 153(d) and 160. By contrast, Congress specifically enacted § 9 of the Act to gauge whether employees support or oppose union representation. 29 U.S.C. § 159

Congress also solely empowered the Board to decide representational issues. Id. By contrast, unfair labor practice charges are filtered sparingly through the General Counsel's discretionary prosecutorial lens. *See* 29 U.S.C. § 153(d); NLRB v. UFCW, 484 U.S. 112 (1987) (General Counsel has unreviewable discretion to issue or not issue unfair labor practice complaints). Allowing the General Counsel to resolve what are effectively representational issues–determining whether the union designated by an employer has the uncoerced support of a majority of employees–is contrary to the basic structure of the Act.

As a practical matter, an after-the-fact investigation of an unfair labor practice allegation does not affirmatively determine the representational desires of employees. It merely hunts for unfair labor practices. It is impossible for the General Counsel, after-the-fact, to divine the true wishes of employees by trying to piece together all the myriad events and circumstances that occurred in a "card check" drive.

2. Conduct Offensive to Employee Free Choice in an NLRB Election, Which Does Not Itself Amount to An Unfair Labor Practice, is Inherent in "Card Check" Campaigns.

A higher standard for union and employer conduct is required in representational proceedings than in unfair labor practice proceedings. In secret-ballot elections, the Board provides a "laboratory" in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine employees' uninhibited desires.[22] A lower standard is utilized in

[22] *See* General Shoe, 77 N.L.R.B. 124, 127 (1948); *see also* NLRB v. Sanitary Laundry, 441 F.2d 1368,

unfair labor practice proceedings.

Conduct that does not rise to the level of an unfair labor practice can interfere with employee free choice in an NLRB election, and warrant overturning the results of that election. *See* General Shoe, 77 N.L.R.B. 124, 127 (1948). A union can become the exclusive bargaining representative of employees via employer recognition by engaging in conduct that would have precluded it from obtaining such status through a secret-ballot election, without committing an unfair labor practice. In fact, conduct objectionable in any secret-ballot election is inherent to union "card check" campaigns!

For example, in an NLRB-supervised secret ballot election, the following conduct has been held to upset the laboratory conditions necessary to guarantee employee free choice, thus requiring the invalidation of the election: (a) electioneering activities, or even prolonged conversations with prospective voters, at or near the polling place;[23] (b) speechmaking by a union or employer to massed groups or captive audiences within 24 hours of the election;[24] and (c) a union or employer keeping a list of employees who vote as they enter the polling place (other than the official eligibility list).[25]

Yet, this conduct occurs in almost every "card check campaign." When an employee signs (or refuses to sign) a union authorization card, he is not likely to be alone. To the contrary, it is likely that this decision is made in the presence of one or more union organizers soliciting the employee to sign a card, and thereby "vote" for the union.[26] This solicitation could occur during or immediately after a union mass meeting or a company-paid captive audience speech. In all cases the employee's decision is not secret, as in an election, as the union clearly has a list of who has signed a card and who has not.[27]

1369 (10th Cir. 1971); Gissel Packing, 395 U.S. 525, 601-602 (1969).

[23] *See* Alliance Ware Inc., 92 N.L.R.B. 55 (1950) (electioneering activities at the polling place); Claussen Baking Co., 134 N.L.R.B. 111 (1961) (same); Bio-Medical Applications of P.R., 269 N.L.R.B. 827 (1984) (electioneering among the lines of employees waiting to vote); Pepsi Bottling Co. of Petersburg, 291 N.L.R.B.578 (1988) (same).

[24] Peerless Plywood Co., 107 N.L.R.B. 427 (1953).

[25] Piggly-Wiggly, 168 N.L.R.B. 792 (1967).

[26] The Board's justification for prohibiting solicitation immediately prior to employee voting in a secret-ballot election is fully applicable to the situation of an employees making a determination as to union representation in a card check drive. "The final minutes before an employee casts his vote should be his own, as free from interference as possible. Furthermore, the standard here applied insures that no party gains a last minute advantage over the other, and at the same time deprives neither party of any important access to the ear of the voter." Milchem Inc., 170 N.L.R.B. 362, 362 (1968). Union soliciting and cajoling employees to sign authorization cards is incompatible with this rationale.

[27] An additional distinction is that in a secret-ballot election, once an employee has made the decision "yea or nay" by casting a ballot, the process is at an end. By contrast, a choice against signing a union authorization card does not end the decision-making process for an employee in the maw of a "card check drive," but often represents only the beginning of harassment for that employee. Eventually, many employees sign union authorization cards just to get the union organizers "off their back."

A very recent Board decision further demonstrates that conduct inherent to a card-check drive is objectionable and coercive if done during a secret-ballot election. In Fessler & Bowman, Inc., 341 N.L.R.B. No. 122 (2004), the Board announced a prophylactic rule that prohibits union officials from performing the ministerial task of handling a sealed secret ballot–even absent a showing of tampering–because where "ballots come into the possession of a party to the election, the secrecy of the ballot and the integrity of the election process are called into question." (Slip. op. at 2).

In a card check campaign, union officials do much more than merely handle a sealed secret ballot as a matter of convenience to one or more of the employees. Union officials directly solicit employees to sign an authorization card (and thereby cast their "vote"), stand over them as they "vote," know with certainty *how* each individual employee "voted," and then physically collect, handle and tabulate these purported "votes." This conduct is infinitely more intimidating and intrusive than the theoretical taint found to warrant a remedy in Fessler & Bowman.

Accordingly, even a card-check drive devoid of conduct that may constitute an unfair labor practice does not approach the "laboratory conditions" guaranteed in a Board-conducted election.[28] The superiority of Board supervised secret-ballot elections for protecting employee free choice is beyond dispute. It is therefore incongruous for the Board to apply the unyielding recognition bar to card check recognitions, because the lack of integrity inherent in such card checks would surely taint a Board election held under similar circumstances.

3. Secret Ballot Elections are a Faster and More Decisive Method to Determine Employee Representational Preferences Than Unfair Labor Practice Proceedings.

Finally, representational proceedings are faster than unfair labor practice proceedings. *See* NLRB Case Handling Manual, ¶ 11000 "Agency Objective" ("The processing and resolution of petitions raising questions concerning representation, i.e., RC, RM, and RD petitions, are to be accorded the highest priority"). This is particularly true in the context of employer recognition bestowed pursuant to a "partnership agreement," as the "partners" are unlikely to file blocking charges against each other that delay an expeditious election.

Representational proceedings are also more decisive, as an election is a one-time occurrence that definitively decides the issue, one way or the other. By contrast, unfair labor practice proceedings generate multiple preliminary decisions as the charge proceeds from the General Counsel, to trial before an Administrative Law Judge, to the Board itself, and then to an appellate court. These proceedings are the equivalent to holding a "sword of Damocles" over a collective bargaining relationship for years.

Thus, representational proceedings are far superior to unfair labor practice proceedings for stabilizing (lawful) collective bargaining relationships, as they settle the issue of whether the employer-recognized union enjoys uncoerced majority support quickly and in "one fell swoop."

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[28] Of course, many card-check drives are also fraught with union coercion, intimidation and misrepresentations that could amount to an unfair labor practice charges. *See eg* HCF Inc., 321 N.L.R.B. 1320 (1996) (union "not responsible" for threats to employee by authorization card solicitor that "the union would come and get her children and it would also slash her tires"); Levi Strauss & Co., 172 N.L.R.B. 732, 733 (1968) (Board recognizes the serious problem of union misrepresentations about the purpose and effect of an authorization card).

Ironically, effectuating the Act's interest in the "stability of labor-management relations" is one of the primary arguments proponents of the recognition bar raise to justify its existence. In reality, by forcing employees to turn to drawn-out ULP proceedings to protect their representational rights, the recognition bar injures that interest.

For all of the above stated reasons, unfair labor practice proceedings are an inadequate and wholly inappropriate substitute for secret-ballot elections for determining employees' true representational preferences.

III. The Superiority of Board Supervised Secret-ballot Elections Is Beyond Dispute.

1. Secret Ballot Elections are the Act's Preferred Method for Determining the Representational Preferences of Employees.

Congress created the NLRA's statutory representation procedures to determine whether employees support or oppose representation by a particular union. *See* 29 U.S.C. § 159. The Supreme Court has long recognized that Board supervised secret-ballot elections are the preferred method for gauging whether employees desire union representation.[29] The Board and the lower courts similarly "emphasize that Board-conducted elections are the preferred way to resolve questions regarding employees' support for unions." Levitz Furniture, 333 N.L.R.B. at 723, *citing* Gissel, 395 U.S. at 602.[30]

Even the AFL-CIO has recognized that NLRB supervised secret-ballot elections are superior to "card checks" in establishing the true choice of the uncoerced majority. With regard to an employer *withdrawing* recognition from a union (as opposed to bestowing recognition), the AFL-CIO argued to the Board that employee petitions and cards advocating decertification "are not sufficiently reliable indicia of the employees' desires," and that employees and employers should only be able to remove a union pursuant a secret-ballot election. *See* Brief of the AFL-CIO to the NLRB in Chelsea Industries & Levitz Furniture Co. of the Pacific, Inc., Case Nos. 7-CA-36846, at 13 (May 18, 1998).[31]

Fully recognizing this principle, the Board has held that non-electoral evidence of employee support–even if untainted by unfair labor practices–is not as reliable in gauging employee support for a union as an election. In Underground Service Alert Southern California, 315 N.L.R.B. 958 (1994), a majority of employees voted for union representation in a

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[29] *See* Linden Lumber Div., Summer & Co. v. NLRB, 419 U.S. 301, 304, 307 (1974); NLRB v. Gissel Packing Co., 395 U.S. 575, 602 (1969) ("secret elections are generally the most satisfactory-indeed the preferred-method of ascertaining whether a union has majority support"); Brooks v. NLRB, 348 U.S. 96 (1954) ("an election is a solemn and costly occasion, conducted under safeguards to voluntary choice").

[30] *See also* Underground Service Alert, 315 N.L.R.B. 958, 960 (1994); NLRB v. Cornerstone Builders, Inc., 963 F.2d 1075, 1078 (8th Cir. 1992).

[31] Clearly, labor union officials are not advocating employer determinations based on cards or petitions because these officials sincerely believe that this method reflects employee sentiment more reliably than a Board supervised secret-ballot election. Rather, they advocate the "card check recognition" process solely to advance their self-serving interests.

decertification election. But, well before the election results were known, a solid majority of employees delivered a signed petition to their employer making clear that they did not support union representation. The employer withdrew recognition. Even though the investigation revealed no "impropriety, taint, factual insufficiency, or unfair labor practice of any type with respect to this employee petition," id. at 959, the Board held that the employer violated the Act because the election results were a far superior indication of employee wishes. The employee petition was considered a "less-preferred indicator of employee sentiment," particularly as compared to "the more formal and considered majority employee preference for union representation which was demonstrated by the preferred method–the Board-conducted secret-ballot election." Id. at 961. The Board explained why:

> The election, typically . . . is a more reliable indicator of employee wishes because employees have time to consider their options, to ascertain critical facts, and to hear and discuss their own and competing views. A period of reflection and an opportunity to investigate both sides will not necessarily be available to an employee confronted with a request to sign a petition rejecting the union. No one disputes that a Board-conducted election is much less subject to tampering than are petitions and letters.

Id. at 960, *quoting* W. A. Krueger Co., 299 N.L.R.B. 914, 931 (1990) (Member Oviatt, concurring in part and dissenting in part).

That the superiority of secret-ballot elections could require extended argument is itself remarkable. Every American understands instinctively that such elections are the cornerstone of any system that purports to be democratic. Accordingly, any averment by union officials that they are attempting to save industrial democracy by eliminating the secret-ballot election should be greeted with the incredulity the proposition deserves.

2. Employee Freedom of Choice is Paramount Under the NLRA, and Thereby Must be Given the Greatest Weight in Any Analysis.

Because NLRB-conducted secret-ballot elections are the best means to effectuate employee free choice as to union representation, it is imperative that the Board favor and encourage this option. After all, "employee free choice" must be granted the greatest weight in any analysis, as the fundamental and overriding principle of the Act is "voluntary unionism." Pattern Makers v. NLRB, 473 U.S. 95, 104-07 (1985).[32]

Any notion that the NLRA's fundamental purpose is to increase the membership ranks of labor organizations is false. The Act exists to enable employees to freely *choose* union representation, or freely *reject* union representation. It does not favor one choice over the

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[32] *See also* Rollins Transportation System, 296 N.L.R.B. 793, 793 (1989) (emphasis added) ("The *paramount concern* . . . must be the employees' right to select among two or more unions, or indeed to choose none") (emphasis added); In re MV Transportation, 337 N.L.R.B. 770, 775 (2002) ("the fundamental statutory policy of employee free choice has paramount value, even in times of economic change"); Bloom v. NLRB, 153 F.3d 844, 849-50 (8th Cir. 1998) ("Enlisting in a union is a wholly voluntary commitment; it is an option that may be freely undertaken or freely rejected"), *vacated & remanded on other grounds sub nom.* OPEIU Local 12 v. Bloom, 525 U.S. 1133 (1999).

other.[33] As former NLRB Member Brame cogently stated: "unions exist at the pleasure of the employees they represent. Unions *represent* employees; employees do not exist to ensure the survival or success of unions." MGM Grand Hotel, 329 N.L.R.B. at 475 (Member Brame, dissenting).

Also, the policy of "encouraging the practice and procedure of collective bargaining," stated in the preamble to the Act at 29 U.S.C. § 151, does not mean that the Act endorses favoritism towards unions or employees who support union representation over those who wish to refrain from union representation. Only where a majority of employees freely select union representation is there any policy interest in promoting collective bargaining or labor stability.

Because collective bargaining is entirely predicated on the exercise of employee free choice enshrined in § 7 of the Act.[34] This is amply demonstrated by the undisputable fact that the NLRA does not favor "collective bargaining" between an employer and a union that *lacks* the uncoerced support of a majority of employees, but instead condemns it as a grievous offense against employee rights.[35]

Since collective bargaining is predicated on employee free choice, the Act's policy of promoting stable collective bargaining relationships favors secret-ballot elections. Unless and until the NLRB holds an election to determine whether employees truly support or oppose union representation, the interest of "encouraging the practice and procedure of collective bargaining" cannot be attributed to any bargaining relationship, as the employer-recognized union may in fact lack majority employee support.[36]

Accordingly, when employees petition for a decertification election after their employer selects a particular union as the representative of its employees, the Board should conduct a secret-ballot election to protect and facilitate the Act's paramount interest in employee free choice. The recognition bar policy, which precludes the NLRB from conducting such elections, should be discarded.

IV. The Board's Recognition Bar Policy Threatens to Render the NLRA's

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[33] Section 7 of the NLRA could not be more clear: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing . . . and shall also have the *right to refrain from any or all such activities.*" (emphasis added). Similarly, § 8(a)(3) precludes "discrimination in regard to hire or tenure of employment or any term or condition of employment to *encourage or discourage* membership in any labor organization." (emphasis added).

[34] *See* Levitz Furniture, 333 N.L.R.B. at 731 (Member Hurtgen, concurring) ("our nation protects and encourages the practice and procedure of collective bargaining *for those employees who have freely chosen to engage in it*"); In re MV Transportation, 337 N.L.R.B. 770, 772 (2002) ("[preservation of the stability of bargaining relationships] is a matter of policy and *operates with respect to those situations where employees have chosen a bargaining relationship*") (citations omitted, emphasis added).

[35] *See* Ladies Garment Workers, 366 U.S. at 737; Majestic Weaving, 147 N.L.R.B. at 860-61.

[36] It is for this reason that the interest in "encouraging . . . collective bargaining" cannot support the Board's current voluntary recognition bar policy, as the bar prevents the Board from determining if the employer-selected union has majority employee support. Without such a determination, there is no interest in preserving the stability of a union/employer bargaining relationship that may be unlawful.

Representational Procedures Irrelevant and Unusable in the Current Age of Voluntary Recognition Agreements.

The recognition bar policy threatens the continued viability of the Board's representation machinery. Unions and employers are taking advantage of the Board's current recognition bar policy by entering into voluntary recognition agreements that render it virtually impossible for the NLRB to conduct secret-ballot elections. The NLRB must not permit self-interested employers and unions to render the representation procedures of § 9 unusable and irrelevant, and deny the Board its supervisory role in the union selection (or rejection) process.

Two common provisions of "partnership" or "neutrality" agreements operate to preclude the use of the Board's procedures. First, virtually all these agreements require an employer to recognize the union without an NLRB election. This provision automatically waives both the employer's and union's right to request a Board-supervised election,[37] and blocks election petitions from employees under the recognition bar.

Second, many "partnership" agreements establish an arbitration procedure that guarantees a collective bargaining agreement in the event that the employer and union are unable to negotiate an agreement within a certain amount of time after employer recognition.[38] This provision effectively ensures that a contract will be signed *before* the recognition bar period expires. *See e.g.* MGM Grand, 329 N.L.R.B. 464 (1999) (recognition bar can last one year or more). Moreover, after this contract is signed, the Board created "contract bar" rules then apply to preclude an election for another three years.[39]

Thus, under current Board policy, many "neutrality" or "partnership" agreements block election petitions for three or more years because (i) employer recognition triggers the recognition bar; (ii) an arbitration provision ensures that a collective bargaining agreement is signed before the voluntary recognition bar expires; (iii) the signing of the collective bargaining agreement triggers the "contract bar," which bars petitions for approximately three years. Under this regime, it is impossible for any party (employee, union or employer) to obtain a secret-ballot election for over three years from the date of union recognition. Unless the Board changes its current policies, the Board's representational machinery is unusable and irrelevant.

Many "neutrality" agreements also cut the Board out of other aspects of the union selection process. Many agreements allow the union to gerrymander the unit to include union supporters and exclude union opponents, thereby removing the Board from the unit determination process.

The Board is also often precluded from determining whether particular organizing conduct is lawful or not, as most voluntary recognition agreements forbid any post-selection

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[37] *See* Central Parking, 335 N.L.R.B. 390 (2001); Verizon Information Systems, 335 N.L.R.B. 558 (2001).

[38] The neutrality and partnership agreements used in the Dana, Metaldyne, and Cequent cases all include such an arbitration provision.

[39] *See* Waste Management of Maryland, 338 N.L.R.B. No. 155 (2003) ("contract bar" precludes election petitions during first three years of a collective bargaining agreement, save a 30-day window period near the end of the period).

disputes to be brought to the Board. The result is that important challenges and objections concerning the conduct of the "card check elections" (as some union officials euphemistically calls them) are not heard by the Board, no matter how coercive the conduct.

This leads to incongruous results like that demonstrated in Service Employees International Union v. St. Vincent Medical Center, 344 F.3d 977 (9th Cir. 2003). There, a union lost an NLRB supervised secret-ballot election, but was nevertheless able to force an employer to "arbitrate" before a private arbitrator over purported objectionable election conduct. The purported "objections" of the SEIU union could have been–and clearly should have been–filed with the Board under its Rules and Regulations. Instead, the Board was cut out of post-election proceedings *in a Board supervised election*!

Such results show the insidious nature of many "voluntary recognition agreements." In effect, private parties can now repeal, at their mutual discretion, all of the Board's Rules and Regulations related to elections and post-election challenges and objections. The Board has no role in any of this, and, apparently, neither do the individual employees whose rights are at stake whenever a union is being selected.

The union strategy of eliminating the NLRB from its proper role in determining representational issues through use of voluntary recognition agreements is having its intended effect. The Board is increasingly cast aside and prevented from making labor law policy and overseeing private sector labor relations. The number of representation elections held by the NLRB in 2003 decreased to 2,333 from 2,723 in 2002, continuing a sharp decline in NLRB elections since 1996, when about 3,300 were conducted. *See* Daily Labor Reporter Online, Union Representation Elections, June 8, 2004. The number of eligible voters in representation elections fell to 148,903 in 2003 from 191,319 in 2002. (Id).

The Board should not (and cannot) abdicate its statutory duties to the self-interested desires of unions and employers. Congress empowered **the NLRB** to administer the NLRA and decide representational matters. *See* 29 U.S.C. §§ 153-54, 159-161. The Board is thereby charged with the responsibility of protecting employee rights under § 7 of the Act, *see, e.g.,* Lechmere Inc. v. NLRB, 502 U.S. 527, 532 (1992), and with administering § 9 of the Act. *See* 29 U.S.C. §§ 159.

> In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled.

General Shoe Corp., 77 N.L.R.B. at 127 (emphasis added). The NLRB must not sit passively on the sidelines and allow its representational processes to become irrelevant. *See e.g.,* Charles I. Cohen, Neutrality Agreements: Will the NLRB Sanction Its Own Obsolescence?, The Labor Lawyer (Fall, 2000).

In short, the increased usage of "recognition agreements" permits employers and unions to strip employees of their § 7 rights and their statutory right to a decertification election, and erases the Board from the process of employees' selecting (or rejecting) a union. These practices must be halted. The first step to doing so is for the Board to eliminate the recognition bar.

Conclusion

For the foregoing reasons, the Board should abandon its recognition bar rule.